

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

COMMUNITY ASSOCIATION FOR  
RESTORATION OF THE  
ENVIRONMENT, INC., a Washington  
non-profit corporation,

Plaintiff,

v.

UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY,

Defendant.

NO: 13-CV-3067-TOR

ORDER RE: MOTIONS FOR  
SUMMARY JUDGMENT

BEFORE THE COURT is Defendant's Motion for Summary Judgment (ECF No. 34) and Plaintiff's Cross Motion for Partial Summary Judgment (ECF No. 39). This matter was heard with oral argument on July 23, 2014. Andrea K. Rodgers Harris and Daniel C. Snyder appeared on behalf of the Plaintiff. Vanessa R. Waldref appeared on behalf of Defendant. The Court has reviewed the briefing and the record and files herein, and is fully informed.

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1 BACKGROUND

2 This case concerns Plaintiff's Freedom of Information Act ("FOIA")  
3 requests to the Environmental Protection Agency ("EPA") regarding information  
4 about certain dairies in the Lower Yakima Valley, Washington, and nitrate  
5 contamination in residential drinking water near the dairies. In the motion now  
6 before the Court, Defendant EPA seeks summary judgment on Plaintiff's claims  
7 and Plaintiff cross-moves for partial summary judgment on Counts I, II, III and V.

8 FACTS

9 In September 2012, an EPA report, "Relation Between Nitrate in Water  
10 Wells and Potential Sources in the Lower Yakima Valley" ("Yakima Valley  
11 Nitrate Study"), found that the dairies in the study ("Yakima Valley Dairies") are a  
12 likely source of nitrate in the residential drinking water wells downgradient of the  
13 dairies. ECF No. 35 at 2. Based on the results of the Yakima Valley Nitrate Study,  
14 the EPA offered to negotiate an agreement with the Yakima Valley Dairies. *Id.* On  
15 March 6, 2013, the EPA reached a legal agreement—the Administrative Order of  
16 Consent ("AOC")—with four of the Yakima Valley Dairies regarding the nitrate  
17 pollution. *Id.* at 2-3. The dairies were: Cow Palace, LLC; George DeRuyter & Son,  
18 LLC and George & Margaret, LLC (part of both D&A and George DeRuyter &  
19 Sons Dairy); Liberty Dairies, LLC and H&S Bosma Dairy (part of Liberty Dairy);  
20 and D&A Dairy, LLC. *Id.* at 3. The EPA contends that it was in negotiations with

1 R&M Haak & Sons Dairy, which was also mentioned in the study. *Id.* But CARE  
2 contends that the EPA knew that the Haaks had no financial resources to address  
3 the AOC criteria and that subsequent EPA actions indicate that no negotiations  
4 were occurring with the Haaks. ECF No. 39-2 at 2.

5 On February 14, 2013, CARE filed lawsuits against the four Yakima Valley  
6 Dairies that entered into the agreement with the EPA. ECF No. 35 at 3. Shortly  
7 before doing so, CARE began to submit FOIA requests to the EPA regarding the  
8 dairies and the nitrate pollution.

#### 9 **FOIA Request One**

10 On January 29, 2013 at 4:50 p.m. Pacific Time, CARE submitted its first  
11 FOIA request to the EPA (“FOIA Request One”), requesting electronic copies of  
12 all preliminary and/or final sampling results of the groundwater sampling in the  
13 Yakima Valley. ECF No. 35 at 4; ECF No. 41-1 at 2. The EPA contends that the  
14 20-day statutory deadline for this request was February 28, 2013. ECF No. 35 at 5.  
15 CARE’s counsel Charles Tebbutt sent a letter to the EPA Region 10 Administrator  
16 stating that CARE believed February 27 was the response deadline. *Id.* EPA  
17 Region 10 Counsel Allyn Stern contacted CARE attorneys Tebbutt and Daniel  
18 Snyder and informed them that the EPA would require additional time to complete  
19 the request. *Id.* The EPA provided written notice that, pursuant to the Agency’s  
20 FOIA regulations under 40 C.F.R. § 2.104(d), the EPA would need an additional

1 ten working days to complete FOIA Request One, until March 14, 2013. *Id.* The  
2 notice indicated that the extension was required because of “[t]he need for  
3 consultation, which shall be conducted with all practicable speed, with another  
4 agency or EPA offices [sic] having a substantial subject-matter interest in your  
5 request.” ECF No. 35-3. All records responsive to FOIA Request One were  
6 released on March 6, 2013. ECF No. 35 at 6; ECF No. 39-2 at 5. CARE did not  
7 appeal the EPA’s response to this request.

8 CARE also states that CARE’s counsel spoke with Allyn Stern, Regional  
9 Counsel for EPA Region 10, on February 28. ECF No. 39-1 at 2. CARE maintains  
10 Stern informed him that the EPA would not make a timely determination on  
11 Request One; that the agency was seeking a time extension based on unusual  
12 circumstances; and that the EPA had located responsive records and was not  
13 reviewing them for disclosure exemptions under the FOIA, and would not produce  
14 responsive documents until after the terms of the AOC were agreed to by the EPA  
15 and the dairies. *Id.*

## 16 **FOIA Request Two**

17 CARE submitted its second FOIA request (“FOIA Request Two”) seeking  
18 records of communications exchanged between the dairies and EPA on Friday  
19 February 1, 2013 at 4:17 p.m. Pacific Time. ECF No. 35 at 6; ECF No. 41-2 at 2.  
20 The EPA states that the appropriate program office was assigned the request on

1 February 6, 2013. ECF No. 35 at 6. CARE states that it received electronic  
2 notification that it had made the request on February 1. ECF No. 39-1 at 4. On  
3 March 5, 2013, the EPA sent a notice to CARE stating that the Agency required an  
4 extension because of “[t]he need for consultation, which shall be conducted with  
5 all practicable speed, with another agency or EPA offices having a substantial  
6 subject-matter interest in your request.” ECF No. 35-4. The notice states that the  
7 new deadline for a disclosure determination is “ten days from today, **March 21,**  
8 **2013.**” ECF No. 35-4, Exhibit 14 (emphasis in original).<sup>1</sup> CARE wrote to the EPA  
9 seeking clarification that the correct deadline was March 19, 2013, but received no  
10 response. ECF No. 39-2 at 7.

11 The EPA responded to FOIA Request Two on March 28, 2013, requesting  
12 written assurance of payment so that the agency could complete the request. ECF  
13 No. 35 at 7. CARE issued payment on April 12, 2013. *Id.* The EPA provided  
14 CARE with its response to FOIA Request Two by granting in-part the release of  
15 approximately 43 records, and partially denied the request by withholding records  
16 under Exemption 4 and Exemption 7(A). *Id.* The EPA states that this response was  
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19 <sup>1</sup> The EPA contends that this is a 10-day extension; CARE contends it was 12-day  
20 extension.

1 dated April 30, 2013, while CARE maintains that it was May 2, 2013, and that the  
2 response was only an “interim response.” ECF No. 39-2 at 8.

3 **Exemption 7(A).** The EPA withheld 61 records under Exemption 7(A),  
4 which were comprised of communications between the Agency and the Yakima  
5 Valley Dairies that pertained to settlement negotiations. ECF No. 35 at 8. On May  
6 30, 2013, CARE appealed the EPA’s response. *Id.* The EPA did not issue a final  
7 appeal determination regarding Exemption 7(A) on June 27, 2013. *Id.* CARE filed  
8 its complaint on June 28, 2013. ECF No. 35 at 8. On July 9, 2013, Haak Dairy’s  
9 counsel informed the EPA that the dairy sold all of its cows.<sup>2</sup> *Id.* On September 18,  
10 2013, the EPA released all records held pursuant to Exemption 7(A). *Id.*

11 **Exemption 4.** The EPA also withheld three notebooks under Exemption 4 as  
12 confidential business information claimed by three Yakima Valley Dairies. ECF  
13 No. 35 at 9. The Region 10 Office of Regional Counsel was delegated the  
14 responsibility of completing a confidentiality determination for the information  
15 claimed as confidential business information (“CBI”) for the three Yakima Valley  
16 Dairies. *Id.* The EPA sent a letter to the dairies on May 3, 2013, informing them

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18 <sup>2</sup> CARE contends that the EPA should have known that Haak Dairy sold its cows  
19 much earlier, in May 2013, if the Agency had been diligently investigating the  
20 dairy. ECF No. 39-2 at 9.

1 that the Agency received a FOIA request for information submitted to the EPA,  
2 which the dairies had claimed as CBI. *Id.* The Yakima Valley Dairies'  
3 substantiation deadline was May 28, 2013. *Id.* Counsel for the dairies contacted the  
4 EPA on May 22, 2013, requesting a ten working-day extension for their response,  
5 stating that:

6 [one attorney's] vision has been impacted by an adverse reaction to an insect  
7 bite she sustained on her eyelid. The swelling and discomfort associated  
8 with this has significantly impacted her ability to work this week and she  
9 will not be able to work the remainder of the week. Second, [another  
10 attorney] will be out for a previously scheduled vacation until Tuesday, May  
11 28—the date the dairy responses are due. The fact that both [attorneys] are  
12 unavailable, coupled with the Memorial Day holiday and our inability to  
13 fully coordinate with our clients, significantly impair the Dairies' ability to  
14 fully respond to the EPA's request.

15 ECF No. 35-5. The EPA granted the Dairies' extension request. ECF No. 35 at 10.  
16 The agency received the substantiations from the three Yakima Valley Dairies on  
17 June 7, 2013. *Id.* On March 11, 2014, the Agency issued an adverse determination  
18 on a subset of the three dairies' CBI claims.<sup>3</sup> *Id.* The three dairies did not seek  
19 judicial review of this partial confidentiality determination, and the EPA released  
20 the information in the partial CBI determination to CARE on March 28, 2014. *Id.*  
CARE received documents that were heavily redacted. ECF No. 39-2 at 11.

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<sup>3</sup> CARE contends that the determination was only partially adverse. ECF No. 39-2  
at 11.

1 On July 21, 2014, two days before the hearing on the motions now before  
2 the Court, the EPA filed a Notice of Case Update Regarding EPA's Final  
3 Confidentiality Determination. ECF No. 55. In it, the EPA states that it has  
4 determined that the information claimed as confidential by the dairies is not a trade  
5 secret or confidential business information, and will accordingly be released to  
6 CARE subject to the EPA's regulations at 40 C.F.R. § 2.205(f). ECF No. 55 at 2.

### 7 **FOIA Request Three**

8 Care submitted its third FOIA request ("FOIA Request Three") on July 12,  
9 2013. ECF No. 35 at 11. The EPA contends that the request was submitted after 5  
10 p.m. Eastern Time, and therefore received it on July 15, 2013. *Id.* On July 15,  
11 2013, the EPA contacted CARE to clarify the scope of its FOIA request. ECF No.  
12 35 at 12. On August 12, 2013, the Agency notified CARE that pursuant to its  
13 FOIA regulations under 40 C.F.R. § 2.104(d), the EPA would need additional  
14 time—until August 28, 2013—to complete FOIA Request Three. ECF No. 35-6,  
15 Exhibit 34. The EPA contends that this is a 10-day extension; CARE contends it  
16 was 12-day extension. On August 27, 2013, the EPA issued its response to FOIA  
17 Request Three and released 74 records. ECF No. 35 at 12. It also withheld certain  
18 information. *Id.* The EPA states that the records were withheld pursuant to FOIA  
19 Exemption 6, and that under this exemption it redacted personal information about  
20 the well users and dairymen. ECF No. 35 at 12. CARE contends that this



1 justification is materially different than what the EPA told CARE in its August 27,  
2 2013, letter; that the EPA did not inform CARE what information was redacted  
3 under what exemption until the present motion was filed, ECF No. 39-2 at 14; and  
4 that records were withheld pursuant to a private agreement reached between the  
5 American Farm Bureau Federation and the EPA, ECF No. 39-1 at 8.

6 The EPA maintains that the EPA also redacted another subset of information  
7 related to ongoing litigation in United States District Court in Minnesota. ECF No.  
8 35 at 12. CARE contends that the EPA did not indicate which information was  
9 being redacted under which exemption or pursuant to a private agreement with a  
10 private litigant. ECF No. 39-2 at 14.

11 **American Farm Bureau Reverse-FOIA litigation.** On July 5, 2013, the  
12 American Farm Bureau Federation (“AFBF”) and the National Pork Producers  
13 Council filed a reverse-FOIA lawsuit against the EPA and its administrator in the  
14 District of Minnesota, seeking preliminary and injunctive relief prohibiting the  
15 release of certain information related to farms and their operations which had been  
16 collected by the Agency. ECF No. 35 at 13. The AFBF claimed that the EPA  
17 released farm information that should have been protected under FOIA Exemption  
18 6. *Id.* The EPA decided to temporarily defer pending and subsequent FOIA  
19 requests seeking the same farm information the AFBF plaintiffs allege is subject to  
20 Exemption 6, based on the complexity of the Exemption 6 analysis before the

1 district court and the nature of the alleged privacy interests at issue. *Id.* CARE  
2 contends that this is an admission that the EPA has violated the FOIA by deciding  
3 to defer properly made FOIA requests for reasons that are not cognizable under the  
4 statute. ECF No. 39-2 at 15. On September 11, 2013, the FOIA Office released in  
5 full the information withheld due to the pending litigation. ECF No. 35 at 14.<sup>4</sup>

#### 6 **FOIA Request Four**

7 CARE submitted its fourth FOIA request (“FOIA Request Four”) on August  
8 28, 2013. ECF No. 35 at 14. The EPA states that the Region 10 FOIA Office  
9 received FOIA Request Four on August 29, 2013 and Region 10 was assigned as  
10 the lead office for this FOIA request. *Id.* The Region 10 FOIA Officer reassigned  
11 FOIA Request Four to the Headquarters FIOA Office on September 3, 2013. *Id.* at  
12 15. The FOIA Office for the Office of Water received FOIA Request Four on  
13 September 4, 2013, and the deadline was calculated to be October 1, 2013. *Id.*  
14 CARE contends that the deadline should have been 20 days after the Agency’s  
15 initial receipt of the request on August 28, 2013. ECF No. 39-2 at 16. On  
16 September 30, 2013, the EPA informed CARE that it would not complete FOIA  
17 Request Four within the 20-day statutory period because of “unusual

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19 <sup>4</sup> CARE contests this statement on grounds that the EPA never specified which  
20 information was being redacted under which exemption.

1 circumstances,” including the “Agency’s need to search for and collect the  
2 requested records from field facilities or other establishments that are separate  
3 from the office processing the request.” ECF No. 35-6, Exhibit 39. The notice  
4 stated that the Agency would respond to FOIA Request Four on or before October  
5 16, 2013. *Id.* After the Federal Government reopened, the EPA contacted CARE  
6 on October 24, 2013, to request an alternative deadline of December 16, 2013, to  
7 complete FOIA Request Four, citing the federal government shutdown (between  
8 the end of the day September 30, 2013, and October 17, 2013). ECF No. 35 at 15-  
9 16. This extension sought more than the statutory 10-day extension. The EPA and  
10 CARE ultimately agreed on an alternative deadline which would require the  
11 Agency to complete FOIA Request Four by December 15, 2013, and provide an  
12 interim response by November 15, 2013. ECF No. 35 at 16. On November 14,  
13 2013, the EPA provided its interim response by releasing seven records to CARE.  
14 *Id.* On December 13, 2013, the EPA issued its response to FOIA Request Four by  
15 releasing 22 partially redacted records and withholding approximately 288  
16 documents pursuant to FOIA Exemption 5. *Id.* CARE did not file an administrative  
17 appeal against the EPA’s December 13 response. *Id.*

18 On June 28, 2013, CARE filed the lawsuit against the EPA now before the  
19 Court. ECF No. 1. On February 4, 2014, CARE amended its complaint, alleging:  
20

- Count 1: Failure to provide timely and legally adequate determination on CARE's FOIA Request Two.
- Count II: Failure to abide by statutory and regulatory procedures in responding to and processing CARE's FOIA requests.
- Count III: Unlawful withholding of records responsive to Request Two under 5 U.S.C. 552(B)(7)(A).
- Count IV: Unlawful withholding of records responsive to Request Two under 5 U.S.C. 552(B)(4).
- Count V: Pattern, practice, and/or policy of unreasonably and unlawfully withholding records responsive to FOIA requests.
- Count VI: Violations of the Administrative Procedure Act.

ECF No. 20.

CARE asks that the Court:

- (1) Order the EPA to promptly provide CARE all the information sought in this action and to immediately disclose the requested documents.
- (2) Declare the EPA's failure to make a timely and legally adequate determination on Request Two to be unlawful under the FOIA, 5 U.S.C. § 552(a)(6)(A)(i); agency action unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1); and/or agency action that is arbitrary,

1 capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C.  
2 § 706(2).

3 (3) Declare the EPA's failure to abide by statutory and regulatory procedures in  
4 responding to and processing CARE's FOIA requests to be unlawful under  
5 the FOIA, 5 U.S.C. § 552(a)(6)(A)(i); agency action unlawfully withheld  
6 and unreasonably delayed, 5 U.S.C. § 706(1); and/or agency action that is  
7 arbitrary, capricious, an abuse of discretion, and not in accordance with law,  
8 5 U.S.C. § 706(2).

9 (4) Declare the EPA's withholding of records responsive to Request Two to be  
10 unlawful under the FOIA, 5 U.S.C. § 552(a)(6)(A)(i); agency action  
11 unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1); and/or  
12 agency action that is arbitrary, capricious, an abuse of discretion, and not in  
13 accordance with law, 5 U.S.C. § 706(2).

14 (5) Declare the EPA's withholding of records responsive to Request Two to be  
15 unlawful under the FOIA, 5 U.S.C. § 552(a)(6)(A)(i); agency action  
16 unlawfully withheld and unreasonably delayed, 5 U.S.C. § 706(1); and/or  
17 agency action that is arbitrary, capricious, an abuse of discretion, and not in  
18 accordance with law, 5 U.S.C. § 706(2); and order the EPA to promptly  
19 provide all the withheld material to CARE.  
20

1 (6) Declare the EPA's pattern, practice and/or policy of reasonably and  
2 unlawfully withholding records response to FOIA request to be unlawful  
3 under the FOIA; agency action unlawfully withheld and unreasonably  
4 delayed, 5 U.S.C. § 706(1); and/or agency action that is arbitrary,  
5 capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C.  
6 § 706(2).

7 (7) Issue appropriate injunctive relief prohibiting the EPA from continuing its  
8 illegal pattern, practice, and/or policy of unlawfully and unreasonably  
9 withholding records responsive to FOIA requests, including a  
10 recommendation that Special Counsel investigate this matter pursuant to 5  
11 U.S.C. § 552(a)(4)(F)(i).

12 (8) Award CARE its reasonable attorney fees and costs pursuant to 5 U.S.C.  
13 § 552(a)(4)(E) and/or 28 U.S.C. § 2412.

14 ECF No. 20.

15 In the motions now before the Court, the EPA moves for summary judgment  
16 on CARE's claims, contending that (1) this Court lacks jurisdiction over CARE's  
17 claims; (2) that CARE fails to state a claim for which relief can be granted; (3) that  
18 CARE's claims are moot because no agency records have been improperly  
19 withheld; (4) that the EPA properly withheld documents under Exemption 7(A),  
20 then properly released them under changed circumstances; (5) that CARE cannot

1 establish that the EPA engaged in a pattern or practice of violating FOIA; (6)  
2 CARE has not exhausted its administrative remedies for its CBI claims and the  
3 court lacks subject matter jurisdiction; and (7) CARE fails to state a claim under  
4 the Administrative Procedure Act. CARE cross-moves for summary judgment on  
5 Counts I, II, III and V.

## 6 DISCUSSION

7 Under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, federal  
8 agencies must make their records available to the public upon request, subject to  
9 nine discretionary exemptions. *See Milner v. Dep't of Navy*, 131 S.Ct. 1259, 1262  
10 (2011). This case presents four FOIA issues: (1) whether the FOIA provides a  
11 cause of action for violations of regulations and statutory provisions about  
12 timeliness and procedure after the agency has produced the requested records; (2)  
13 whether instances of lateness, improper withholding and allegations of future harm  
14 are sufficient to constitute a “pattern and practice” of violations under the FOIA;  
15 (3) under what circumstances a plaintiff “substantially prevails” under the FOIA’s  
16 fee-shifting provision; and (4) whether the Administrative Procedure Act (“APA”)   
17 provides a cause of action for an agency’s violations of FOIA procedure.<sup>5</sup>

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19 <sup>5</sup> Though Plaintiff alleges in Count IV of its Second Amended Complaint that the  
20 EPA unlawfully withheld records responsive to FOIA Request Two under 5 U.S.C.

1 Summary judgment may be granted to a moving party who demonstrates  
2 “that there is no genuine dispute as to any material fact and that the movant is  
3 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party  
4 bears the initial burden of demonstrating the absence of any genuine issues of  
5 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then  
6 shifts to the non-moving party to identify specific genuine issues of material fact  
7 which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
8 242, 256 (1986). “The mere existence of a scintilla of evidence in support of the  
9 plaintiff’s position will be insufficient; there must be evidence on which the jury  
10 could reasonably find for the plaintiff.” *Id.* at 252.

11 For purposes of summary judgment, a fact is “material” if it might affect the  
12 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any  
13 such fact is “genuine” only where the evidence is such that a reasonable jury could  
14 find in favor of the non-moving party. *Id.* In ruling upon a summary judgment  
15 motion, a court must construe the facts, as well as all rational inferences therefrom,  
16 in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372,  
17 § 552(B)(4), the parties agreed at oral argument the Court need not consider this  
18 count in light of the EPA’s July 21, 2014, case update (ECF No. 55), which states  
19 that the EPA will release the records. Accordingly, the Court will not further  
20 consider this argument here.



1 378 (2007). Only evidence which would be admissible at trial may be considered.  
2 *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002).

3 The Freedom of Information Act (“FOIA”) gives individuals a judicially-  
4 enforceable right of access to government agency documents. *Lion Raisins v. U.S.*  
5 *Dep't of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004) (citing 5 U.S.C. § 552). The  
6 Supreme Court has interpreted the disclosure provisions of FOIA broadly, noting  
7 that the act was animated by a “philosophy of full agency disclosure.” *John Doe*  
8 *Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989); *see also Dep't of the Air*  
9 *Force v. Rose*, 425 U.S. 352, 361 (1976) (“disclosure, not secrecy, is the dominant  
10 objective of the Act”). In order to prevent disclosure of a limited class of sensitive  
11 government documents, FOIA lists nine statutory exemptions. 5 U.S.C.  
12 § 552(b)(1)-(9). Unlike the disclosure provisions of FOIA, its statutory exemptions  
13 “must be narrowly construed.” *John Doe Agency*, 493 U.S. at 152.

14 **1. Whether the FOIA provides a cause of action for Counts I and II**

15 Defendant EPA argues that the FOIA provides no cause of action for  
16 Plaintiff’s claims that the EPA failed to provide a timely and legally adequate  
17 determination on Request Two (“Count I”) and to abide by statutory and regulatory  
18 procedures in responding to and processing CARE’s FOIA requests (“Count II”).  
19 The Court agrees.

1 Under 5 U.S.C. § 552(a)(4)(B), jurisdiction over FOIA claims is dependent  
2 upon a showing that an agency has (1) “improperly”; (2) “withheld”; (3) “agency  
3 records.” *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136,  
4 150 (1980). “Judicial authority to devise remedies and enjoin agencies can only be  
5 invoked, under the jurisdictional grant conferred by § 552, if the agency has  
6 contravened all three components of this obligation.” *Id. See also Payne*  
7 *Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) (“A  
8 declaration that an agency's initial refusal to disclose requested information was  
9 unlawful, after the agency made that information available, would constitute an  
10 advisory opinion in contravention of Article III of the Constitution.”).

11 Here, the EPA has produced all records responsive to FOIA Request One,  
12 ECF No. 35 at 8; has produced all records responsive to FOIA Request Two except  
13 those withheld under Exemption 4, which will be released to CARE per its Notice  
14 of Case Update (ECF No. 55); has produced all records requested under Request  
15 Three and withheld pursuant to the AFBF litigation; and has produced records  
16 pursuant to Request Four except for the approximately 288 documents withheld  
17 pursuant to FOIA Exemption 5, ECF No. 35 at 16; ECF No. 39-2 at 17. Thus, all  
18 records requested have either been produced or withheld pursuant to a FOIA  
19 exemption. Under the FOIA, relief is only available for records that have been  
20 withheld. Accordingly, under the FOIA, CARE can challenge the EPA’s

1 withholdings under the exemptions as well as claim that there is an impermissible  
2 pattern or practice in responding to FOIA requests (see below). However, it  
3 appears that CARE cannot, under the FOIA, challenge the individual timeliness of  
4 production or the Agency's compliance with statutory or regulatory guidelines  
5 with respect to documents that have been produced.

6 Furthermore, production of requested nonexempt material moots FOIA  
7 claims. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) ("Defendants  
8 correctly cite authority for the proposition that the production of all nonexempt  
9 material, 'however belatedly,' moots FOIA claims.") (citing *Perry v. Block*, 684  
10 F.2d 121, 125 (D.C. Cir. 1982); 5 U.S.C. § 552); *See also Yonemoto v. Dep't of*  
11 *Veterans Affairs*, 305 F. App'x 333, 334 (9th Cir. 2008) (unpublished) (citing  
12 *Papa*, 281 F.3d at 1013, and holding that the VA's production of redacted material  
13 in the discovery process of his EEOC claim moots his FOIA claims); *Walsh v. U.S.*  
14 *Dep't of Veterans Affairs*, 400 F.3d 535, 536 (7th Cir. 2005) ("In general, '[o]nce  
15 the government produces all the documents a plaintiff requests, her claim for relief  
16 under the FOIA becomes moot.'"); *Carter v. Veterans Admin.*, 780 F.2d 1479,  
17 1481 (9th Cir. 1986) ("We hold, however, that since Carter's complaint sought  
18 injunctive relief directing the V.A. to provide the documents he requested, it was  
19 mooted when the V.A. voluntarily mailed copies of the regulations to Carter.").

1 Plaintiff contends that the failure to make a timely determination *is* an  
2 improper withholding under the FOIA, even if the documents are later produced.  
3 ECF No. 52 at 2 (citing *Oregon Natural Desert Ass'n v. Gutierrez*, 409 F. Supp. 2d  
4 1237, 1248 (D. Or. 2006) (hereinafter “*ONDA*”). The *ONDA* court held “that an  
5 untimely response is a violation of FOIA, regardless of the final outcome of the  
6 request.” *Id.* In *ONDA*, “[the Agency] responded well past the statutory time limits,  
7 with the first request extending from April 30, 2004 to a response on December 20,  
8 2004 and the second request occurring on January 7, 2005 but never receiving a  
9 technically complete response. The information provided on March 7, 2005 did not  
10 explain [the requestor’s] appeal rights.” *Id.* In *ONDA*, the agency responded well  
11 past the statutory time limits, waiting eight months to respond to one of the  
12 plaintiff’s requests and not providing an adequate response to a second request. *Id.*  
13 Plaintiff contends that, though the EPA made a response, it did not make a  
14 determination, as defined in *Citizens for Resp. and Ethics in Wash. v. FEC*, 711  
15 F.3d 180, 185 (D.C. Cir. 2013) (hereinafter “*CREW*”). As such, the EPA’s  
16 determination on Request Two is a year late, CARE argues, and falls into the  
17 egregious lateness giving rise to a cause of action described in *ONDA*. In *CREW*,  
18 the D.C. Circuit has held that to constitute a determination, “within the relevant  
19 time period, the agency must at least inform the requester of the scope of the  
20 documents that the agency will produce, as well as the scope of the documents that

1 the agency plans to withhold under any FOIA exemptions.” *Id.* at 185. “The statute  
2 requires that, within the relevant time period, an agency must determine whether to  
3 comply with a request—that is, whether a requester will receive all the documents  
4 the requester seeks.” *Id.* at 188-89.

5 Here, however, the EPA appears to have made a determination on Request  
6 Two by April 30, 2013, when, as Plaintiff puts it, the Agency “provided CARE  
7 with a subset of documents responsive to Request Two” and “explained that EPA  
8 was withholding documents under Exemptions 7(A) and 4.” ECF No. 39-1 at 6.  
9 Thus, the Agency appears to have made a determination within the definition  
10 provided in *CREW*. The EPA produced documents and explained that it was  
11 withholding other documents pursuant to an exception. The EPA then, pursuant to  
12 Exemption 4, proceeded to conduct a confidentiality determination. ECF No. 39-1  
13 at 6. Thus, while the agency’s response was still late per statutory guidelines, it is  
14 not as egregiously late as the response the *ONDA* court took issue with. As such,  
15 the instant facts are distinguishable from those in *ONDA*. Furthermore, in *CREW*  
16 the D.C. Circuit explicitly held that the agency’s penalty for not making a timely  
17 determination is that it “cannot rely on the administrative exhaustion requirement  
18 to keep cases from getting into court.” *CREW*, 711 F.3d at 189 (“If the agency does  
19 not make a ‘determination’ within the relevant statutory time period, the requester  
20 may file suit without exhausting administrative appeal remedies.”). That the EPA’s

1 determination was not made under the definition in *CREW* until nearly a year after  
2 the request does not necessarily make the EPA's deficiency actionable under the  
3 FOIA.

4 Thus, the Court finds that there is no cause of action under FOIA for Counts  
5 I and II.

6 **2. Whether the EPA engaged in a pattern or practice of FOIA violations**

7 Despite this, an agency's time limit and procedural violations may warrant a  
8 remedy under the FOIA if there is a pattern and practice of such violations.

9 Plaintiffs may bring a claim alleging a pattern and practice of unreasonable delay  
10 in responding to FOIA requests. *Hajro v. U.S. Citizenship & Immigration Servs.*,  
11 832 F. Supp. 2d 1095, 1107 (N.D. Cal. 2011) ("It is undisputed that a plaintiff may  
12 bring a claim alleging 'a pattern and practice of unreasonable delay in responding  
13 to FOIA requests.'"); *see also Liverman v. Office of the Inspector Gen.*, 139  
14 Fed.Appx. 942, 944 (10th Cir. 2005) (quoting *Mayock v. Nelson*, 938 F.2d 1006,  
15 1008 (9th Cir. 1991)); *Gilmore v. U.S. Dep't of Energy*, 33 F.Supp.2d 1184, 1189  
16 (N.D. Cal. 1998) (finding that plaintiff may allege a pattern or practice of untimely  
17 responses to his FOIA requests even if a court already has determined that the  
18 documents sought were not improperly withheld). The Court has jurisdiction to  
19 hear a claim alleging a pattern and practice of unreasonable delay in responding to  
20 FOIA requests, even where the plaintiff's FOIA request had already been resolved.

1 *See, e.g., Payne Enter., Inc. v. United States*, 837 F.2d 486, 490-91 (D.C. Cir.  
2 1988) (production of documents does not moot pattern or practice claim).  
3 “Injunctive relief is warranted in order to remedy a pattern and practice of FOIA  
4 violations by an agency where there is ‘a probability that alleged illegal conduct  
5 will recur in the future.’” *Hajro*, 832 F. Supp. 2d at 1108 (quoting *Long v. United*  
6 *States Internal Revenue Service*, 693 F.2d 907, 909 (9th Cir. 1982)). “In deciding  
7 whether to grant an injunction, the court must consider the effect on the public of  
8 disclosure or nondisclosure, the good faith of any intent to comply expressed by  
9 the agency, and the character of past violations.” *Id.* (citing *Long*, 693 F.2d at 909).

10 Count V of CARE’s Second Amended Complaint alleges that the EPA  
11 engaged in a pattern, practice, and/or policy of unreasonably and unlawfully  
12 withholding records responsive to FOIA requests. ECF No. 20 at 39. Defendant  
13 EPA contends that the facts in this case do not support the rare circumstances in  
14 which courts provide relief after an agency has provided the requested records; i.e.,  
15 Plaintiff cannot establish that the EPA has a pattern or practice of refusing to  
16 produce records under the FOIA and is disclosing them only to avoid judicial  
17 review. ECF No. 34 at 17. The EPA further contends that CARE cannot  
18 demonstrate any harm in fact by any improper withholding. *Id.* CARE cites several  
19 types of violations it argues form the pattern or practice of violations. It contends  
20 that the EPA demonstrated a pattern or practice of unreasonably withholding

1 records responsive to FOIA requests based on justifications not legally cognizable  
2 under the FOIA when it (1) repeatedly failed to promptly make the records  
3 available, (2) delayed production of records based on its desire to complete  
4 negotiations with the dairies, and (3) privately agreed to withhold documents  
5 related to the AFBF litigation; and (4) failed to meaningfully evaluate whether  
6 records responsive to FOIA requests are exempt from disclosure under the  
7 confidential business information exemption. ECF No. 20 at 40-43. The Court  
8 considers each in turn.

9 **Whether CARE suffered an injury-in-fact**

10 Defendant EPA contends that CARE has suffered no injury in fact from any  
11 alleged untimely production of documents. The Supreme Court has established that  
12 the minimum constitutional requirements for standing are: (1) the plaintiff must  
13 have suffered an injury in fact—an invasion of a legally protected interest which is  
14 (a) concrete and particularized and (b) actual or imminent, not conjectural or  
15 hypothetical; (2) there must be a causal connection between the injury and the  
16 conduct complained of—the injury has to be fairly traceable to the challenged  
17 action of the defendant, and not the result of the independent action of some third  
18 party not before the court; and (3) it must be likely, as opposed to speculative, that  
19 the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*,  
20



1 504 U.S. 555, 560–61 (1992). The party invoking federal jurisdiction bears the  
2 burden of establishing standing. *Id.* at 561.

3 A district court in the Ninth Circuit has held that an agency’s failure to  
4 process a FOIA request “in a timely manner was itself an injury—an invasion of a  
5 legally protected interest, as defined in *Defenders of Wildlife*.” *Gilmore v. U.S.*  
6 *Dep’t of Energy*, 33 F. Supp. 2d 1184, 1188-89 (N.D. Cal. 1998). The court  
7 explained that “Congress has made it clear that a person filing a FOIA request has  
8 a concrete interest in prompt processing of that request. *Id.* at 1189. In *Gilmore*,  
9 the agency properly denied plaintiff’s December 8, 1993 FOIA request, but did so  
10 long after the deadline for responding, on May 2, 1994. *Id.* at 185.

11 Here, the Court agrees with the *Gilmore* court that CARE’s interest in the  
12 timely production of the documents is sufficient to meet the “injury-in-fact”  
13 requirement for standing. Thus, the Court will consider the merits of Plaintiff’s  
14 pattern and practice claim.

15 **Whether the EPA’s requests for extensions were timely.** Insofar as  
16 Plaintiff claims that the EPA’s failure to provide timely determination on its  
17 requests is a violation, the Court disagrees.

18 CARE first contends that the EPA exceeded the 20-day deadline for  
19 responding to Requests One and Two. The EPA’s FOIA implementing regulations  
20 state that “[u]nless the Agency and the requester have agreed otherwise, or when

1 unusual circumstances exist as provided in paragraph (e) of this section, EPA  
2 offices will respond to requests no later than 20 working days from the date the  
3 request is received and logged in by the appropriate FOI Office.” 40 C.F.R.  
4 § 2.104(a). “On receipt of a request, the FOI Office ordinarily will send a written  
5 acknowledgment advising you of the date it was received and of the processing  
6 number assigned to the request for future reference.” 40 C.F.R. § 2.104(b).

7 CARE contends that the deadline for Request One was February 27, 2013,  
8 but that the EPA sent no extension request until February 28, 2013, and that  
9 records were not produced until after the terms of the AOC were agreed to on  
10 March 5, 2013. ECF No. 39-1 at 3-4. The EPA contends that CARE has calculated  
11 the dates incorrectly, and that the confirmation of receipt to which CARE refers  
12 (which was sent on the same day as the requests) are automatically generated by  
13 the system. ECF No. 35-2 at 10. The EPA contends that within the FOIA online  
14 program, FOIA requests received after 5 p.m. Eastern Time or submitted on non-  
15 working days will be considered received on the next working day. *Id.* Thus, the  
16 EPA considered Request One to be received on January 30, 2013, and counted  
17 February 28, 2013, as a federal holiday; as such, the deadline for Request One was  
18 February 28, 2013. The Court agrees. The received date indicated on the FOIA  
19 online system (cited by Defendant) is January 30, 2013. ECF No. 35-3 at 7. The  
20 EPA’s regulations provide that the office will respond to the request “no later than

1 20 working days from the date the request is received and logged in by the  
2 appropriate FOI office.” 40 C.F.R. § 2.104(a)<sup>6</sup>. CARE can hardly expect a request  
3 received by the system 10 minutes from the end of the business day Pacific Time,  
4 and after close of business Eastern Time, to be received and logged in by the  
5 appropriate office that same day. Calculating receipt by the next business day is  
6 standard in automated systems. Many banks, for example, will consider deposits  
7 made after a certain time as made on the next day. Accordingly, the Court finds  
8 that the request was “received” by the EPA on January 30, 2013, and as such the  
9 20-day deadline for the EPA’s response was February 28, 2013. Thus, the EPA’s  
10 response was not untimely.

11 CARE also contends that the deadline for Request Two was March 4, 2013,  
12 but the EPA responded untimely because it did not request an extension until  
13 March 5. ECF No. 39-1 at 5. The Court disagrees for the reasons explained above.

14 CARE submitted its online request Friday February 1, 2013, at 4:17 p.m. Pacific

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15 <sup>6</sup> See also 5 U.S.C. § 552(6)(A)(i) (Each agency shall “determine within 20 days  
16 (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any  
17 such request whether to comply with such request and shall immediately notify the  
18 person making such request of such determination and the reasons therefor, and of  
19 the right of such person to appeal to the head of the agency any adverse  
20 determination...”).

1 Time. As above, it is reasonable that the request be considered received the next  
2 business day, Monday, February 4, 2013. Accordingly, counting the February 18,  
3 2013, federal holiday, the 20-day deadline would be March 5, 2013. As such, the  
4 EPA's March 5, 2013, request for an extension was timely.

5 **Whether the EPA's extensions exceeded the limits under FOIA and its**  
6 **implementing regulations**

7 CARE also contends that the EPA exceeded the 10-day extension limit  
8 provided for by the FOIA.

9 With respect to time extensions, the EPA's FOIA implementation  
10 regulations provide that

11 [w]hen the statutory time limits for processing a request cannot be met  
12 because of "unusual circumstances," as defined in the FOIA, and the time  
13 limits are extended on that basis, you will be notified in writing, as soon as  
14 practicable, of the unusual circumstances and of the date by which  
15 processing of the request should be completed. When the extension is for  
16 more than 10 working days, the Agency will provide you with an  
17 opportunity either to modify the request so that it may be processed within  
18 the 10 working day time limit extension or to arrange an alternative time  
19 period for processing the original or modified request.

20 40 C.F.R. § 2.104(d).

CARE contends that the ten-day extension to Request Two should have been  
March 19, not March 21, as the EPA stated. ECF No. 39-1 at 5. The EPA counters  
that FOIA Request Two was assigned to the correct program office on February 6,  
2013; as such, the 20-day deadline for FOIA Request Two is March 7, 2013.

1 Accordingly, the Agency argues, the 10 day extension runs from March 7, 2013,  
2 not March 5, and therefore extends to March 21, 2013, instead of March 19. ECF  
3 No. 35 at 6. However, the Court need not determine which deadline is correct,  
4 because the EPA provided an “interim response” on March 28, 2013, and therefore  
5 missed the deadline by either calculation.

6 Request Three was submitted late Friday afternoon on July 12, 2013. The  
7 EPA would have considered the request received on the next business day, July 15,  
8 2013, ECF No. 35-2 at ¶ 45, but the request needed clarification and EPA did not  
9 receive clarification from CARE until late that evening. *Id.* Thus, the EPA should  
10 have considered the request received on July 16, 2013, with a due date of August  
11 13, 2013. The EPA then invoked the unusual circumstances requirement for an  
12 extension on August 12, 2013, because of “[t]he need to search for, collect, and  
13 appropriately examine a voluminous amount of separate and distinct records  
14 involved in” the request. ECF No. 35-6, Exhibit 34. The letter stated that the new  
15 due date was August 28, 2013 (because the EPA mistakenly believed the 20-day  
16 due date was August 14, 2013). *Id.* CARE contends that this is a 12-day, not a 10-  
17 day extension. ECF No. 39-1 at 10. Both parties were wrong. With a 10-day  
18 extension from the properly calculated 20-day deadline (August 13, 2013), the  
19 EPA had until August 27, 2013 to timely respond. By happenstance, it did so that  
20 day. ECF No. 35-2 at ¶ 47; ECF No. 35-6, Exhibit 35.

1 With respect to Request Four, CARE again contends that the EPA  
2 improperly effectuated a 12-day, not a 10-day extension. ECF No. 39-1 at 10.<sup>7</sup>  
3 Request Four's analysis is not quite so simple, however. Request Four was  
4 submitted late afternoon on August 28, 2013, thus, it was considered received the  
5 next day. However, the agency timely determined that a different office should  
6 respond to the request for information. ECF No. 35-2 at ¶ 51. The EPA  
7 transmitted the request to the proper FOIA office which was then received on  
8 September 4, 2013. *Id.* The 20-day deadline was October 2, 2013. The EPA  
9 invoked the unusual circumstances requirement for an extension in a letter dated  
10 September 30, 2013, because of the "need to search for and collect the requested  
11 records from field facilities or other establishments that are separate from the  
12 office processing the request." ECF No. 35-6, Exhibit 39. The letter accurately  
13 stated that the new due date was October 16, 2013. *Id.*

14 Unfortunately, the Federal Government was shut down on October 1 to  
15 October 17, 2013. Only then did the EPA seek greater than the 10-day statutory  
16 extensions, based on these exceptional circumstances. The EPA provided CARE

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17  
18 <sup>7</sup> In the EPA's request for a later deadline, it provided CARE an opportunity to  
19 narrow or modify its request as well as contact information for a liaison, as  
20 required. ECF No. 35 at 16; ECF No. 39-2 at 17.

1 an opportunity to narrow or modify its request and provided contact information of  
2 its Public FOIA Liaison. ECF No. 35-7, Exhibit 41. The records were eventually  
3 provided, or exceptions invoked. *See* ECF No. 35-2, ¶¶ 57-60.

4 CARE contends that because the extensions were more than 10 days, under  
5 the regulations and the FOIA, the extensions must include an opportunity to  
6 narrow the scope of the request, arrange an alternative timeframe, or make the  
7 EPA's public liaison available. ECF No. 39-1 at 10. *See* 40 C.F.R. § 2.104(d)  
8 ("When the extension is for more than 10 working days, the Agency will provide  
9 you with an opportunity either to modify the request so that it may be processed  
10 within the 10 working day time limit extension or to arrange an alternative time  
11 period for processing the original or modified request.")<sup>8</sup>. However, having found

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12 <sup>8</sup> *See also* 5 U.S.C. § 552(a)(6):

13  
14 No such notice shall specify a date that would result in an extension for  
15 more than ten working days, except as provided in clause (ii) of this  
subparagraph.

16 (ii) With respect to a request for which a written notice under clause (i)  
17 extends the time limits prescribed under clause (i) of subparagraph (A), the  
18 agency shall notify the person making the request if the request cannot be  
19 processed within the time limit specified in that clause and shall provide the  
20 person an opportunity to limit the scope of the request so that it may be  
processed within that time limit or an opportunity to arrange with the agency  
an alternative time frame for processing the request or a modified request.

5 U.S.C. § 552(6).

1 that the extensions for Request Two and Three did not exceed 10 business days  
2 from the initial 20-day deadline (calculated from when the appropriate department  
3 received the request), the Court finds that the EPA was not required to include the  
4 language giving the requestor an opportunity to narrow its request, arrange for an  
5 alternative timeframe, or make a public liaison available.

6 It is clear on this record that the EPA issued the required language with  
7 respect to Request Four and its highly unusual circumstances of the government  
8 shutdown.

9 **Whether the EPA's grounds for extensions were valid**

10 CARE also argues that the EPA required the extensions on improper  
11 grounds. The Court disagrees. The FOIA provides that:

12 In unusual circumstances as specified in this subparagraph, the time limits  
13 prescribed in either clause (i) or clause (ii) of subparagraph (A) may be  
14 extended by written notice to the person making such request setting forth  
the unusual circumstances for such extension and the date on which a  
determination is expected to be dispatched.

15 5 U.S.C. § 552(6)(B)(i). Under the FOIA:

16 “[U]nusual circumstances” means, but only to the extent reasonably  
17 necessary to the proper processing of the particular requests--**(I)** the need to  
18 search for and collect the requested records from field facilities or other  
19 establishments that are separate from the office processing the request; **(II)**  
20 the need to search for, collect, and appropriately examine a voluminous  
amount of separate and distinct records which are demanded in a single  
request; or **(III)** the need for consultation, which shall be conducted with all  
practicable speed, with another agency having a substantial interest in the



1 determination of the request or among two or more components of the  
2 agency having substantial subject-matter interest therein.

3 5 U.S.C.A. § 552(a)(6)(B)(iii).

4 CARE appears to argue that, pursuant to the FOIA and implementing  
5 regulations, the EPA could not validly seek an extension to Request One in order  
6 to wait for the EPA and the Yakima Dairies to come to an agreement on the AOC.  
7 CARE also argues that there is no enumerated exemption allowing the Agency to  
8 withhold records to wait for the AOC negotiations to be completed. The Court  
9 agrees that this would be an invalid reason for withholding, but does not find that  
10 the EPA withheld records responsive to Request One, nor did it base its extension  
11 on this impermissible reason. CARE contends that the EPA's counsel, Allyn Stern,  
12 represented to CARE that the EPA was withholding the documents on grounds that  
13 it was waiting for the AOC negotiations to be resolved—an invalid reason for an  
14 extension under the FOIA. ECF No. 39-1 at 2. However, the notice provided to  
15 CARE indicates that the EPA's reasoning for requiring the 10-day extension was  
16 “[t]he need for consultation, which shall be conducted with all practicable speed,  
17 with another agency or EPA offices having a substantial subject-matter interest in  
18 your request.” ECF No. 35-3, Exhibit 9. Thus, the EPA properly sought an  
19 extension for a reason recognized by the FOIA. *See* 5 U.S.C.  
20 § 552(a)(6)(B)(iii)(III). The EPA ultimately produced the requested records on

1 March 6, 2013, within the time allotted for the extension. Thus, the Request One  
2 records were not withheld; they were produced within the period designated by the  
3 properly brought extension.

4 **Whether CARE’s “interim determinations” on Request Two are**  
5 **untimely because they are not final determinations**

6 CARE also contends that the Agency’s March 28 and April 30, 2013,  
7 responses to Request Two are not final determinations under the FOIA and  
8 therefore a final determination on Request Two is untimely. Thus, CARE  
9 maintains, the delay in issuing a determination on Request Two is not a “five-day”  
10 delay as the EPA claims but a delay of more than a year. ECF No. 52 at 2. As the  
11 Court determined above, the EPA responded within the definition described in  
12 *CREW*; accordingly, it finds this argument unpersuasive.

13 Thus, for these reasons, the Court finds that the undisputed facts show only  
14 one violation of the timeliness in responding to CARE’s FOIA requests—and  
15 demonstrates a delay of only a few days. Common sense dictates that a single  
16 violation cannot constitute a “pattern” or a “practice.” Accordingly, the Court finds  
17 that CARE’s pattern and practice claim must fail.

18 ///

19 ///

20 ///

1       **3. Whether CARE “substantially prevailed” on Count III for attorney fee**  
2       **purposes**

3       Count III of CARE’s Second Amended Complaint alleges that the EPA  
4       unlawfully withheld records responsive to FOIA Request Two under 5 U.S.C.  
5       § 552(B)(7)(A). ECF No. 20 at 36. The EPA ultimately released these records, and  
6       CARE concedes in its reply briefing that Count III is moot to the extent that CARE  
7       initially sought a declaration that the EPA’s Exemption 7(A) withholdings were  
8       improper. ECF No. 52 at 6. However, CARE contends that this count is not moot  
9       for purposes of an award of attorney fees and costs, having “substantially  
10      prevailed” under the FOIA because the EPA voluntarily changed its position  
11      following CARE’s filing of the instant lawsuit. ECF No. 52 at 6-7. The EPA  
12      counters that CARE did not substantially prevail because it released the records  
13      due to “changed circumstances.” ECF No. 48 at 5. The Court finds that the  
14      undisputed facts indicate that the EPA released the Haak records because of  
15      changed circumstances.

16      The fee-shifting provision of FOIA states that the Court “may assess against  
17      the United States reasonable attorney fees and other litigation costs reasonably  
18      incurred in any case under this section in which the complainant has substantially  
19      prevailed.” 5 U.S.C. § 552(a)(4)(E)(i). “[A] complainant has substantially  
20      prevailed if the complainant has obtained relief through either—(I) a judicial order,

1 or an enforceable written agreement or consent decree; or (II) a voluntary or  
2 unilateral change in position by the agency, if the complainant's claim is not  
3 insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii). The Ninth Circuit has crafted a two-step  
4 process for determining whether a party may be awarded fees and costs under  
5 § 552(a)(4)(E). To be eligible for an award, a party must show both that "(1) the  
6 filing of the action could reasonably have been regarded as *necessary* to obtain the  
7 information," and that "(2) the filing of the action had a *substantial causative*  
8 effect on the delivery of the information." *Church of Scientology of California v.*  
9 *U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983) ("*Church of Scientology*");  
10 *Rosenfeld v. United States Dep't of Justice*, 903 F.Supp.2d 859, 865 (N.D. Cal.  
11 2012).<sup>9</sup>

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13 <sup>9</sup> In 2001, the Supreme Court held that plaintiffs generally would only be eligible  
14 for attorney fees if they were "awarded some relief by [a] court." *Buckhannon Bd.*  
15 *& Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603  
16 (2001). Congress then passed the OPEN Government Act of 2007, Pub. L. No.  
17 110-175, which abrogated the rule of *Buckhannon* in the FOIA context and  
18 revived the possibility of FOIA fee awards in the absence of a court decree. *See*  
19 *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524-26 (D.C.  
20 Cir. 2011). The D.C. Circuit held that the "purpose and effect of this law, which

1 Defendant contends that a requestor does not prevail when an agency  
2 produces previously withheld records after an exemption becomes inapplicable due  
3 to changed circumstances. ECF No. 48 at 5. The Agency contends that  
4 circumstances changed when, a month after the lawsuit was filed, the Haak Dairy  
5 sold its cows and ceased operating as a dairy; as such, its production of the  
6 documents was in response to those “changed circumstances” rather than CARE’s  
7 lawsuit. Here, the evidence indicates that the EPA produced the documents after  
8 Haak Dairy told the agency it had sold all of its cows. CARE filed its lawsuit on  
9 June 28, 2013. ECF No. 1. On July 9, 2013, the EPA claims that Haak Dairy told  
10 the Agency it had sold all of its cows. ECF No. 34 at 5. Haak sold its cows in May,  
11 2013. ECF No. 39-1 at 6. Two months later, on September 18, 2013, the Agency  
12 released the Haak records. Thus, the information was released after Haak Dairy  
13 told the EPA it sold its cows, the very reason the EPA cited for having released the  
14 information. Accordingly, the Court finds that CARE has not sustained its burden  
15 of showing that the filing of the lawsuit had a “substantial causative effect” on the  
16 EPA’s decision to release the records.

17 ///

18 ///

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19 remains in effect today, was to change the ‘eligibility’ prong back to its pre-  
20 *Buckhannon* form.” *Id.*

1       **4. Whether the EPA violated the Administrative Procedure Act**

2           Count VI of CARE's Second Amended Complaint alleges that the EPA  
3 violated the Administrative Procedure Act ("APA"). ECF No. 20 at 44. Defendant  
4 EPA contends that Plaintiff does not challenge final agency action for which there  
5 is no other adequate remedy in a court, so its APA claim may not stand. ECF No.  
6 34 at 21.

7           The parties agree that if the Court finds that CARE has an adequate remedy  
8 for its claims under FOIA, the Court need not consider CARE's parallel APA  
9 claims. ECF No. 52 at 11. However, if the Court finds that one or more of CARE's  
10 claims is not cognizable under the FOIA, CARE renews its request to submit  
11 additional briefing concerning its APA claims. *Id.*<sup>10</sup>

12           Having found above that CARE has no remedy against the EPA under the  
13 FOIA for not timely producing records or following its regulations, the Court  
14 grants CARE's request to allow the parties an opportunity to brief the merits of  
15 CARE's claim under the APA.

16 ///

17 \_\_\_\_\_  
18 <sup>10</sup> *But see Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th  
19 Cir. 1998) ("[T]he APA does not provide an independent basis for subject matter  
20 jurisdiction in the district courts.").

**IT IS HEREBY ORDERED:**

1. Defendant's Motion for Summary Judgment (ECF No. 34) is

**GRANTED in part and DENIED in part.**

2. Plaintiff's Cross Motion for Partial Summary Judgment (ECF No. 39) is  
**DENIED.**

3. The parties are directed to submit additional briefing, if desired, on the availability of relief under the Administrative Procedure Act. Cross Motions for Summary Judgment shall be filed by both parties on or before **October 6, 2014**. Responsive briefing will proceed in accordance with Local Rule 7.1.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

**DATED** August 6, 2014.



*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge